Supreme Court, U.S.
FILED

961792 MAR 10 1997

NO.
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BRIAN OVERBEEK, Petitioner

-vs-

CHARLES HEIMBECKER, RICHARD HELLENBRAND, and GENERAL CASUALTY COMPANY OF WISCONSIN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMBROSE & CUSHING, P.C.
Attorneys for Petitioner
221 N. LaSalle St., S-2248
Chicago, Illinois 60601
(312) 726-1470

John C. Ambrose

39 pp

QUESTIONS PRESENTED FOR REVIEW

This case presents a question, under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), about the authority of a Court of Appeals in a diversity case governed by state law to ignore a mandatory state statute and deny prejudgment interest based on equitable considerations.

This case also presents a question, under Erie R. Co. v. Tompkins, about the authority of a Court of Appeals in a diversity case governed by state law to ignore the facts of record and to infer circumstantially the existence of an adequate tender sufficient to toll the accrual of prejudgment interest, when state law does not permit such an inference.

TABLE OF CONTENTS

	Page
Questions Presented for Review.....	1
Table of Contents.....	2
Table of Authorities.....	3
Opinions Delivered in Case.....	5
Jurisdictional Statement.....	6
Constitutional Provisions, Statutes and Regulations.....	7
Statement of the Case.....	8
Argument.....	11
Conclusion.....	20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Kojo, 110 Wis. 2d 22, 327 N.W. 2d 195 (1982)..... 15

Board of Commissioners of Jackson County, Kansas, v. United States, 308 U.S. 343 (1939)..... 13, 14

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).....12,16,17,20,22

Fort Howard Paper Co. v. Standard Havens, Inc., 901 F. 2d 1373 (7th Cir. 1990)..... 12

Giffen v. Tigerton Lumber Co., 26 Wis. 2d 327, 132 N.W. 2d 572 (1965).....18

In re Oil Spill by the Amoco Cadiz, 954 F. 2d 1279, 1334 (7th Cir. 1992)..... 16

Kiefert v. Maple Valley Mutual, 158 Wis. 340 (1914)..... 19

Loehrke v. Wanta Builders, Inc., 151 Wis. 2d 695, 445 N.W. 2d 717 (1989). 18,19

Nelson v. Travelers Insurance Co., 102 Wis. 2d 159, 306 N.W. 2d 71 (1981)..... 20

West Virginia v. United States,
479 U.S. 305 (1987).....13, 14,15

STATUTES

Wisconsin Statutes Annotated
814.04(4).....7, 12

OPINIONS DELIVERED IN CASE

The opinions of the District Court and the Court of Appeals for the Seventh Circuit are set forth in full in the Appendix.

JURISDICTIONAL STATEMENT

The petitioner filed a complaint in the District Court for the Western District of Wisconsin invoking the District Court's diversity jurisdiction under 28 U.S.C. Section 1332 and 1391. After the District Court entered judgment for the petitioner but fixed the liability limit, denied prejudgment interest on any portion of the award, and denied costs, the petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, invoking that Court's jurisdiction under 28 U.S.C. Section 1291. The Seventh Circuit Court of Appeals affirmed the District Court's order on December 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), and the Petition for Certiorari is timely filed under United States Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

> [I]f the judgment is for the recovery of money, interest at a rate of 12% per year from the time of verdict...until judgment is entered shall be computed by the clerk and added to the costs.

Wisconsin Statutes Annotated 814.04(4).

STATEMENT OF THE CASE

Petitioner, Brian Overbeek, was riding on a motorcycle in Wisconsin in 1985, when respondent Heimbecker drove an automobile across the center line and into Overbeek, rendering him a quadriplegic. Heimbecker and his passenger, Hellenbrand, had been drinking beer from a keg in the car for several hours and were intoxicated at the time of the collision.

In 1986, Overbeek sued both Heimbecker and Hellenbrand, the owner of the car, as well as Hellenbrand's insurance carrier, General Casualty of Wisconsin ("Casualty"). After a 1987 trial, the jury returned a verdict finding Heimbecker and Hellenbrand liable, awarding damages in the amount of $2,263,133, and denying punitive damages. The District Court entered judgment in that amount

against Heimbecker and Hellenbrand but entered no judgment with respect to Casualty.

Overbeek filed a notice of appeal regarding denial of punitive damages, and the respondents filed notices of cross-appeal. After these motions were filed, Overbeek filed further motions asking the District Court to correct its oversight and enter judgment against Casualty to the extent of its coverage of each defendant. The respondents argued that the total amount of the judgment should be $25,000.

Rather than enter a judgment order, the District Court instructed Overbeek's counsel either to accept the $25,000 or withdraw his notice of appeal and conduct an evidentiary hearing. Overbeek's counsel advised the District Court in writing that neither option was

appropriate.

On March 28, 1991, all appeals were dismissed. On August 22, 1995, Overbeek filed a motion to have a final judgment order entered as to Casualty. Overbeek sought a $50,000 judgment against Casualty plus costs and interest, the prejudgment interest to be calculated at 12% according to Wisconsin statute.

On March 21, 1996, the District Court entered judgment in favor of Overbeek and against Casualty in the amount of $25,000 "without prejudgment interest on this or any other portion of the judgment awarded originally and without costs." (App. 7) Overbeek's motion to alter or amend judgment was denied on April 4, 1996, and Overbeek filed a notice of appeal on April 17, 1996.

The Circuit Court of Appeals for

the Seventh Circuit filed an opinion on December 9, 1996, affirming the District Court's judgment. (App. 8)

ARGUMENT

I.

The Court of Appeals' Application of Equitable Considerations To Deny Prejudgment Interest Is Contrary To The Explicit Language Of The Governing State Statute And Violates The Doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)

Wisconsin law supplies the rule for the award of prejudgment interest in this diversity case. Fort Howard Paper Co. v. Standard Havens, Inc., 901 F. 2d 1373, 1383 (7th Cir. 1990). By statute, interest in Wisconsin runs from the time of the verdict until judgment is entered, and the clerk is mandated to compute it at the rate of 12% per year. W.S.A. 814.04(4). There is no provision in this statute that permits a court to deny interest on equitable grounds. In Wisconsin, interest applies automatically, by operation of law.

Despite the mandatory language of the operative Wisconsin statute, the Court of Appeals for the Seventh Circuit upheld the District Court's decision to deny all statutory prejudgment interest. The Court of Appeals, like the District Court, found it "grossly unfair to make General Casualty pay interest which accrued solely due to the intransigence of plaintiff's counsel." (App. 13)

In support of the proposition that "equitable considerations can bar otherwise valid claims for interest," the Court of Appeals cited West Virginia v. United States, 479 U.S. 305, 311 n. 3 (1987) (App. 13) The West Virginia case referred to the equitable doctrine of laches, and in turn cited Board of Commissioners of Jackson County, Kansas, v. United States, 308 U.S. 343 (1939).

This Court's decision in Board of Commissioners points up precisely why equitable considerations are not appropriate in this case, governed as it is by Wisconsin statutory law. In Board of Commissioners, the Government's right to prejudgment interest had never been codified by Congress. This Court expressly noted that Congress left the matter for judicial determination "within the framework of familiar remedies equitable in their nature." 308 U.S. at 351. In the West Virginia case, as well, this Court noted that prejudgment interest was not governed either by state or federal statute or by local common law. 479 U.S. at 308-09.

In this case, prejudgment interest is governed by a Wisconsin statute that mandates computation of interest at 12% from the time of verdict until judgment

is entered. Further, the Wisconsin reviewing court has rejected laches, the applicable doctrine in West Virginia v. United States, as an exception to the accrual of statutory prejudgment interest in Wisconsin.

In Anderson v. Kojo, 110 Wis. 2d 22, 327 N.W. 2d 195 (1982), a plaintiff sought to enforce a judgment more than twelve years old and requested an amount of statutory interest that caused the original amount due to more than double. The reviewing court held that delay, even if occasioned by the plaintiff, was not cause to deny his action for the judgment amount and interest. The Wisconsin court rejected a laches argument, reasoning that the debtor was not prejudiced by the passage of time because it retained the use of the money. Indeed, the Seventh Circuit

Court of Appeals itself has appropriately pointed out that "the passage of time...is a reason to award interest, not to deny it." In re Oil Spill by the Amoco Cadiz, 954 F. 2d 1279, 1334 (7th Cir. 1992).

Nevertheless, in the face of unambiguous state authority that must govern in a diversity action, the Court of Appeals in this case applied an equitable argument to deny statutory prejudgment interest. This decision that a state statute and interpretive case law may simply be ignored is without precedent and must be overturned as violative of this Court's decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that a federal court in a diversity case must apply state law.

II.

The Court of Appeals' Finding Of A Tender Tolling The Accrual Of Interest Was Made In The Absence Of Any Supporting Evidence And Was In Contravention Of State Law, Thus Violating The Doctrine Of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The Court of Appeals held that General Casualty was not obligated to pay interest even on the minimal $25,000 policy limit because it "offered to pay" that sum and therefore "was no longer on the hook for any interest." (App. 12) However, the Court of Appeals did not address the following facts:

1. Casualty never offered to pay $25,000 plus the mandated statutory interest.

2. Casualty never tendered payment of any amount until September 22, 1995, when Casualty's attorney tried to hand Overbeek's counsel a check for $25,000

and no required statutory interest.

3. Casualty's attorney, in a letter dated September 13, 1995, conditioned payment of the $25,000 and no statutory interest on Overbeek's execution of a satisfaction of judgment.

The $25,000 check did not constitute legal tender because it was not the full amount due. The tender of an amount less than the full amount due, made on condition that it be accepted as satisfaction in full of an obligation, does not stop the running of interest on the entire debt amount; in such a case, interest continues to accrue on the full amount due if the amount due is greater than that tendered. Giffen v. Tigerton Lumber Co., 26 Wis. 2d 327, 132 N.W. 2d 572, 575 (1965); Loehrke v. Wanta Builders, Inc., 151 Wis. 2d 695, 445 N.W. 2d 717, 722 (1989).

In the face of undisputed evidence of the absence of a proper tender under state law, the Court of Appeals held that it was "convinced, given the circumstances of this case, that General Casualty had a check at the ready, and its repeated offers were sufficient to toll the accrual of interest." (App. 12) The Court cited no authority for this finding of a proper tender based only on "circumstantial evidence." Even "repeated offers" to pay less than the full amount are expressly not sufficient under Wisconsin law. Loehrke, supra.

Casualty always had the option of tendering $25,000 plus interest and costs to the Clerk of the Court in order to meet its obligation. Kiefert v. Maple Valley Mutual, 158 Wis. 340 (1914). By its own admission, it chose to forego that option in order to earn interest on

the $25,000. Its enjoyment of the benefit of holding Overbeek's money since the date of verdict is precisely the inequity which Wisconsin law seeks to correct through the assessment of interest. Nelson v. Travelers Insurance Co., 102 Wis. 2d 159, 306 N.W. 2d 71, 76 (1981).

The holding of the Court of Appeals for the Seventh Circuit that it could infer that Casualty had a check "at the ready" was based on no evidence. Further, the Court's finding of a valid tender in Casualty's "repeated offers" to settle (1) for a sum less than the total amount due (2) on condition that Overbeek execute a satisfaction of judgment directly contravenes governing Wisconsin law. Its decision must be overturned as violative of this Court's decision in Erie R. Co. v. Tompkins, 304

U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that a federal court in a diversity case must apply state law.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Brian Overbeek, respectfully urges that this Court's review is important and desirable in order to assure a result in compliance with dispositive state law, as required by this Court's opinion in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Respectfully submitted,

John C. Ambrose

AMBROSE & CUSHING, P.C.
Attorneys for Petitioner
221 N. LaSalle St.,
Suite 2248
Chicago, Illinois 60601
(312) 726-1470

March 7, 1997

APPENDICES

	Page
1. Opinion of District Court	App. 1
2. Opinion of Court of Appeals, Seventh Circuit	App. 9

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIAN OVERBEEK,

Plaintiff,

v.

CHARLES HEIMBECKER, RICHARD HELLENBRAND & GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendants.

OPINION AND ORDER

86-C-0450-C

Eight and one-half years after the jury returned a verdict in favor of plaintiff Brian Overbeek and three and one-half years after the parties stipulated to the dismissal of all appellate proceedings, plaintiff has moved for entry of judgment against defendant General Casualty Company. In 1985, plaintiff was rendered a quadriplegic after being hit by a car driven by defendant Charles Heimbecker and owned by defendant Richard Hellenbrand. Plaintiff brought suit against both men and defendant Hellenbrand's automobile insurer, defendant General Casualty, only to learn that the limits of Hellenbrand's insurance were $25,000 and that both men were essentially judgment proof. Despite this knowledge, plaintiff's counsel rejected all offers to accept the policy limits of $25,000, including one offer

made before he filed the suit. Plaintiff's counsel made two abortive and ethically questionable attempts to persuade each of the individual defendants to settle the suit for the policy limits as to that defendant only, leaving the other uncovered. Not surprisingly, defendants rejected these efforts. However, approximately six weeks before the start of trial, General Casualty offered double its policy limits in an attempt to resolve the case. Plaintiff rejected this offer as it had all previous ones.

Plaintiff's counsel went forward with an unnecessary trial on October 5, 1987, which was made much more difficult than it should have been by plaintiff's counsel's unfamiliarity with Wisconsin law and his failure to have anticipated and researched any of the unusual and difficult issues of state law that came up during the case. The jury found that the driver of the car, defendant Heimbecker, was acting as the servant of the owner, defendant Hellenbrand. The jury was not asked to decide whether defendant Hellenbrand committed any independent act of negligence.

After the liability phase of the trial had been concluded and before the damages phase began, I held a conference with counsel and asked plaintiff's counsel whether it made sense to proceed to determine damages in view of the facts that defendants had offered double the policy limits to resolve the case and that the individual defendants seemed to have no financial resources with which to satisfy any judgment against them. Counsel insisted on proceeding and obtained a jury verdict of $2,263,133. Less than a week later, counsel for defendant Heimbecker

wrote to plaintiff's counsel reiterating General Casualty's willingness to pay its policy limits of $25,000 in return for a satisfaction of judgment. (Defendant Heimbecker had no insurance coverage of his own; he was covered only through defendant Hellenbrand's insurance with General Casualty.) Again, plaintiff declined the offer. On October 28, 1987, judgment was entered for plaintiff and against defendants Heimbecker and Hellenbrand. Through inadvertence, no reference was made in the judgment to defendant General Casualty. Plaintiff's counsel said nothing about the omission but took an appeal of the case to the Court of Appeals for the Seventh Circuit. On December 17, 1987, the court of appeals ordered the parties to brief the question of jurisdiction, noting the absence of a final judgment as to General Casualty and a possible lack of timeliness in the filing of the notice of appeal.

In January 1988, plaintiff filed a motion in this court for an amendment of the judgment to add General Casualty "to the extent of its coverage therein." In a second motion, plaintiff asked the court to add General Casualty to the judgment "to the extent of its coverage as the parties may agree or as later may be determined." On February 12, 1988, a hearing was held on the motions, at which local counsel appeared in place of plaintiff's trial counsel. Counsel for General Casualty objected to the entry of a judgment that did not specify the amount of the policy limits. At the request of plaintiff's local counsel, I agreed to stay entry of any order to give local counsel an opportunity to consult with trial counsel and advise the court how

plaintiff wished to proceed. I indicated to counsel that if plaintiff wished to have the judgment vacated and a determination made of the coverage issue, it would be necessary to move to withdraw the appeal he had filed in the court of appeals. Plaintiff never moved to withdraw the appeal or filed anything further in this court until August 22, 1995,when he filed his motion for entry of judgment. (In the interim, however, he had taken the inexplicable step of suing defendant General Casualty in Cook County, Illinois, for $25,000 and interest on the October 28, 1987 judgment. This action was dismissed.)

In filing the August 22, 1995 motion for entry of judgment, plaintiff did not submit a proposed form of judgment or indicate in his moving papers what he expected the judgment to cover. It was not until the end of the hearing on the motion on September 22, 1995, that plaintiff made it known that he was seeking judgment against General Casualty in the amount of $50,000 (double the policy limits), costs and interest on the full amount of the $2,263,133 judgment entered in behalf of plaintiff on October 28, 1987. I denied the motion for costs as untimely and ordered the parties to brief plaintiff's entitlement to double the policy limits and payment of interest on the full amount of the judgment.

Plaintiff complied with the order and now asserts his right to be awarded double the policy limits, together with interest on the full amount of the judgment. With respect to the double policy limits argument, he argues that the "base judgment" should be $50,000 because both Hellenbrand and Heimbecker are covered persons and the

contract of insurance provides for payment of $25,000 for each covered person. He cites no law for this proposition and makes no reference to any of the hurdles he would have to overcome before he could prevail on his argument. For example, plaintiff has never argued before that the contract should be read in the manner he now urges. Under Wisconsin law it is his burden to prove that his claims come within the coverage of the contract. Just v. Land Reclamation, Ltd., 151 Wis. 2d 593, 605, 445 N.W. 2d 683, 688 (Ct. App. 1989), reversed on other grounds, 155 Wis. 2d 737, 456 N.W. 2d 570 (1990). Generally, he must make this showing at trial. In this case, plaintiff adduced no evidence at trial to prove his contention that the insurance contract provides for payment of the policy limits for both defendants Hellenbrand and Heimbecker. To do so, he would have had to establish active negligence on the part of both men because the law in Wisconsin is that a finding of vicarious liability does not lead to dual coverage. Landsinger v. American Family Mutual Insurance Co., 142 Wis. 2d 138, 142-43, 417 N.W. 2d 899, 900 (Ct. App.) (where liability is vicarious, running from servant to master, only the single person limit applies), review denied, 417 N.W. 2d 896 (1987). Defendant Hellenbrand was not found actively negligent; his liability was strictly vicarious as the owner of the car and the "master" of the driver, Heimbecker. Therefore, the policy limits are $25,000 for the active negligence of defendant Heimbecker. Furthermore, the policy itself provides that coverage is limited to one person:

> The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident... This is the most we will pay regardless of the number of covered persons, claims made, vehicles or premiums shown in the Declarations, or vehicles involved in the auto accident.

General Casualty policy, Exh. A, Affidavit of Mark W. Andrews, dated Oct. 20, 1995. (Emphasis in original.)

Plaintiff's argument that General Casualty owes post-judgment interest on the full amount of the judgment entered is as frivolous as his double policy limits argument. No judgment was ever entered against General Casualty so as to trigger an independent obligation to pay post-judgment interest. Its obligation to pay post-judgment interest on the judgment entered against its insureds is limited by the terms of its policy, which provide that the company will pay interest on any judgment entered in any suit it defends, but that the duty to do so ends when the company offers to pay "that part of the judgment which does not exceed [its] limit of liability for this coverage." Once the company offered the policy limits on October 15, 1987, one week after the verdict was rendered and a week before entry of judgment, its obligation to pay interest expired.

Plaintiff argues that General Casualty should be liable for prejudgment interest on the full amount of the award,

but there is nothing to this argument. Under Wisconsin law, which supplies the rule for the award of prejudgment interest in this diversity case, Fort Howard Paper Co. v. Standard Havens, Inc., 901 F. 2d 1373, 1383 (7th Cir. 1990), prejudgment interest is awarded only when the sum owed is fixed and certain. Loehrke v. Wanta Builders, Inc., 151 Wis. 2d 695, 706, 445 N.W. 2d 717, 722 (Ct. App. 1989). Throughout these proceedings, plaintiff has refused to identify the amount of the fixed sum for liability coverage owed by General Casualty. Certainly, that sum is not $50,000, because there is no legal basis on which to hold General Casualty liable for double its policy limits, despite its generous offer to pay that amount in order to resolve the case prior to trial. Plaintiff has been consistently unwilling to agree that General Casualty's obligation is $25,000, although he had innumerable chances to agree to that amount and end this Jarndyce v. Jarndyce litigation. Because it has been plaintiff's counsel's intransigence that has prevented the amount of defendant's obligation from being reduced to judgment, it would be unfair to hold General Casualty liable for prejudgment interest.

It is time to end this unfortunate and ill-advised litigation over liability that was conceded almost ten years ago. Plaintiff's counsel has caused General Casualty to incur significant costs to defend his baseless motions and abused the resources of three different courts.

ORDER

IT IS ORDERED that the judgment entered herein on October 28, 1987, is AMENDED to add that judgment is entered in favor of plaintiff Brian Overbeek and

against defendant General Casualty Company of Wisconsin in the amount of $25,000.00, without prejudgment interest on this or any other portion of the judgment awarded originally and without costs. It is unnecessary to address the motion to strike filed by plaintiff on March 19, 1996, because I have not placed any reliance on the Wisconsin Court of Appeals' decision he believes should not be given consideration.

Entered this 21st day of March, 1996.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB

District Judge.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 96-1957

BRIAN OVERBEEK,
Plaintiff-Appellant,

v.

CHARLES HEIMBECKER, RICHARD HELLENBRAND, and GENERAL CASUALTY COMPANY OF WISCONSIN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin, No. 86-C-0450-C - Barbara B. Crabb, Judge.

ARGUED OCTOBER 31, 1996 -
DECIDED DECEMBER 9, 1996

Before POSNER, Chief Judge, and FLAUM and EVANS, Circuit Judges.

EVANS, Circuit Judge. Thirteen times General Casualty Company offered to settle a personal injury case against one of its insureds for the policy limit of $25,000. General Casualty made the offer before trial. General Casualty made the offer during the trial. General Casualty made the offer after trial. At times, General Casualty even offered double the policy limit to make the litigation go away.

Thirteen times the plaintiff's counsel rejected the offers and insisted on a trial and various other proceedings. Now, over 9 years after the trial wrapped up, plaintiff's counsel has knocked on our door, asking for 12 percent interest on not just the $25,000 owed under General Casualty's policy but also on a $2.2 million verdict rendered against its insured. Some might find this argument creative; most would find it frivolous. None would find it persuasive.

The underlying facts of this case are tragic. On June 1, 1985, Richard Hellenbrand tossed his car keys to his buddy, Charles Heimbecker, and the two zoomed off in Hellenbrand's Trans-Am. The pair took the phrase "one for the road" to new depths, bringing a tapped beer keg along for the ride. While driving along Gannon Road in rural Columbia County, Wisconsin, Heimbecker crossed the centerline and struck 22-year-old Brian Overbeek's motorcycle. The accident left Overbeek quadriplegic.

Overbeek sued Hellenbrand, Heimbecker, and Hellenbrand's automobile insurer, General Casualty, in district court. Unfortunately, on top of being incredibly irresponsible, both men were broke. Added to this mix was the fact that Hellenbrand's policy with General Casualty topped out at only $25,000, a sum not even remotely adequate to compensate Overbeek for his loss. But all things sad are not untrue. Realistically here, only $25,000 was available. Rather than accept reality, Overbeek's lawyer rejected General Casualty's repeated offers -- including one before the case was even filed -- to settle the case for the policy limit. Even offers of double the policy

limit wouldn't do. Instead, Overbeek's counsel insisted on presenting the case to the jury. On October 7, 1987, after a 3-day trial, a jury found that Heimbecker was negligent, and because he was acting as Hellenbrand's servant, General Casualty was required to pay on its policy. Two days later the jury fixed compensatory damages against Hellenbrand and Heimbecker at a little over $2.2 million but denied punitive damages. Both during and after the trial, General Casualty's offer to settle for the policy limit was refused.

On October 28, 1987, the district court entered judgment against Hellenbrand and Heimbecker but inadvertently failed to name General Casualty in the judgment. Neither party caught the omission. Then, Overbeek's lawyer, apparently not believing that Hellenbrand and Heimbecker would be just as judgment-proof on an additional award as they were on a $2.2 million judgment, appealed the jury's decision to deny punitive damages. Almost 9 years ago, on December 17, 1987, we noted the apparent absence of a final judgment against General Casualty and asked the parties to brief whether jurisdiction was proper. Subsequently, the case went back to the district court.

In January 1988 Overbeek filed a motion in the district court to amend the judgment to include General Casualty "to the extent of its coverage therein" or "to the extent of its coverage as the parties may agree or as later may be determined." General Casualty objected to the somewhat wishy-washy language of the proposed amendment and asked the court to enter judgment against it for $25,000. In a hearing on Overbeek's motion in February 1988, the district court stayed entry of

judgment against General Casualty at the request of Overbeek's local counsel.

That same day, Overbeek's lawyer dashed off a letter, informing the court that the judgment would be inappropriate and he would try pushing his luck without it on appeal. Three and a half years then went by without so much as a peep from Overbeek's lead counsel In March 1991 Overbeek's lawyer agreed to dismiss his appeals, but he didn't request the entry of judgment. Finally, in late 1995, after unsuccessfully suing General Casualty for $25,000 in Illinois state court, Overbeek's counsel resurfaced in district court, requesting entry of judgment against General Casualty for $50,000 plus over 8 years of prejudgment interest. Overbeek also requested that General Casualty fork over 12 percent interest on the $2.2 million judgment against Heimbecker and Hellenbrand. The district court rejected these arguments, entered judgment against General Casualty in the amount of $25,000, and denied interest and costs. Overbeek appeals.

Overbeek first argues that Wisconsin Statute Sec. 814.04(4) requires General Casualty to shell out 8 years of 12 percent interest on the entire $2.2 million judgment against the insureds. Only two hurdles lie in Overbeek's path: the law and common sense. In Blank v. USAA Property & Cas. Ins. Co., 200 Wis. 2d 270, 546 N.W. 2d 512 (Ct. App. 1996), a case conveniently ignored by Overbeek, the court rejected a strikingly similar argument, stating: "Section 814.04(4), Stats., does not impose interest on the verdict upon the insurer for sums in excess of policy limits. The statute merely directs the clerk how to compute

the interest on the verdict; contrary to plaintiff's contention, whether the insurer and not the insured is to pay this interest depends on the terms of their insurance contract." Id. at 281. General Casualty's policy with Hellenbrand notes only that it will pay interest on behalf of its insured arising **after** the judgment. However, even that obligation ends once the insurance company offers to pay the policy limits -- something General Casualty did repeatedly in this case.

As a practical matter, requiring General Casualty to pay interest on the $2.2 million judgment would make no sense. The purpose of postjudgment interest is not to punish a defendant but to encourage prompt payment and compensate a plaintiff for another party's use of its money. Nelson v. Travelers Ins. Co., 102 Wis. 2d 159, 169, 306 N.W. 2d 71, 76 (1981). First, general Casualty could not have been more prompt in offering the $25,000, for as we noted, it offered to pay before Overbeek even filed suit. Second, General Casualty was never responsible for the $2.2 million; that judgment was only against the insureds. It follows, then, that General Casualty could not have not inequitably retained use of the money and does not owe interest on the entire verdict.

Overbeek next argues that General Casualty is liable for over 8 years of interest on the $25,000 verdict against it. Again, we disagree. Once General Casualty offered the policy limits, it was no longer on the hook for any interest. While Overbeek complains that General Casualty did not formally tender a check to the clerk's office, we are convinced, given the circumstances of this case, that

General Casualty had a check at the ready, and its repeated offers were sufficient to toll the accrual of interest. Finally, the lion's share of the blame for the delay in entering judgment against General Casualty rests squarely on the shoulders of Overbeek's counsel. Instead of agreeing that the court should enter judgment against General Casualty for $25,000 in 1988, Overbeek's lawyer tried to wiggle out from under the policy limit by claiming dualcoverage. Counsel then disappeared until 1991, when he agreed to withdraw the appeal filed back in 1987. Next, in 1993 he tried to sue General Casualty for $25,000 -- an amount he wouldn't accept in district court -- in Illinois state court. Overbeek's lawyer didn't come up for air again until late 1995, when he asked for $50,000 plus costs and interest. As the district court noted, it would be grossly unfair to make General Casualty pay interest which accrued solely due to the intransigence of plaintiff's counsel. See West Virginia v. United States, 479 U.S. 305, 311 n. 3 (1987) (noting equitable considerations can bar otherwise valid claims for interest).

Finally, Overbeek claims that the district court abused its discretion in failing to award costs under Rule 54(d)(1). We think the district court's decision falls well short of an abuse of discretion. Rule 54(d)(1) gives a district court discretion to deny costs when exceptional circumstances are present. Smith v. DeBartoli, 769 F. 2d 451, 453 (7th Cir. 1985), cert. denied, 475 U.S. 1067 (1986). This case is chock full of exceptional circumstances. Overbeek's counsel inexplicably refused

over a dozen offers of the policy limit, needlessly pursued a trial, appealed the jury's decision not to award punitive damages even though the defendants were judgment-proof, vanished for large periods of time, frivolously argued for dual coverage, and even wasted time and resources hauling General Casualty into an Illinois court for no apparent reason. It's sad that only a pittance was available to Overbeek for his terrible injuries, but that fact could not be changed by a decade of protracted and needless litigation.

Finding no fault with any of the decisions of the district court, its judgment is AFFIRMED.